Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

ARTHUR PENA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ANTHONY J. IACULLO
Counsel of Record
PAUL M. DASILVA
IACULLO & MARTINO, LLC
Attorneys for Petitioner
103 Park Street
Third Floor
Montclair, NJ 07042
(973) 746-5858

171897

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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QUESTION PRESENTED

According to the United States Sentencing Guidelines (U.S.S.G.) Section 2C1.1, the base offense level for offenses involving the receipt of bribes is determined by several factors including the benefit received or to be received by the payor of the bribe. In the case at bar, defendant, a police office, accepted bribes in return for permitting illegal poker video gambling machines to operate without interference. Application Note 2 of section 2C1.1 defines the value of "the benefit received or to be received" to mean the "net value" of such benefit. Although the Note goes on to instruct that the amount of the bribe is not to be deducted from the calculation, it does not explain whether you net out the costs of maintaining the illegal activity. The Third Circuit held in this case that "net value" of the "benefit" received does not mean "net profit" and does not require accounting for the costs incurred in maintaining the illegitimate enterprise. However, as the Third Circuit recognized in its decision, this ruling is in direct conflict with the Seventh Circuit's decision in *United States v. Sapoznik*, 161 F.3d 1117 (7th Cir. 1998) in which the Government conceded and the court agreed, that the relevant "benefit received" is indeed profit (net revenue) and not (gross) revenue.

The question thus presented is whether under the United States Sentencing Guidelines, the "net value" of the "benefit received" indeed means net profit.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The District Court's opinion is not otherwise published. Appendix B. The Court of Appeals' opinion is published at 268 F.3d 215 (2001). Appendix A. The Court of Appeals order denying rehearing and rehearing en banc are not otherwise published. Appendix C.

STATEMENT OF JURISDICTION

The Court of Appeals entered its opinion and Order on October 10, 2001 and denied rehearing and rehearing en banc on November 28, 2001. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of the United States Sentencing Guidelines relevant to this petition are reprinted in Appendix D and the relevant Application Note is reprinted in Appendix E.

STATEMENT OF THE CASE

Petitioner, Arthur Pena, ("Pena") was charged in Superseding Indictment Criminal Number 98-22(04). This Indictment included various counts charging Pena with violation of the United States Code. At trial, Pena was found guilty of Count 16 of the superseding indictment charging him with Conspiracy to Commit Extortion Under the Color of Official Right from 1989 to 1996, relating to protection

payments made by GMOG Video, in violation of Title 18, United States Code, Section 1951(a). On February 18, 2000, the Honorable Jerome B. Simandle, U.S.D.J. sentenced Arthur Pena under the United States Sentencing Guidelines to 57 months.

The Government's case against Pena resulted from a three (3) year investigation conducted by the Public Corruption Unit of the Newark Division of the Federal Bureau of Investigation, and the Criminal Investigation Division, Public Corruption Unit of the Newark Office of the Internal Revenue Service. The investigation uncovered corruption in the West New York, New Jersey Police Department ("WNYPD").

The investigation stemmed from information received by the FBI and IRS which pointed towards the distribution and use of video gambling machines in West New York and the subsequent protection of these machines and their owners by the WNYPD. Petitioner was a WNYPD officer for approximately 18 years. As set forth above, he was convicted of Count 16 of the superseding indictment charging him with conspiracy to commit extortion under the color of official right related to protection payments made by GMOG Video.

In support of its position regarding revenue of GMOG for the relevant time for Pena's sentence, the Government presented the Affidavit of Special Agent Kenneth O'Connor of the Federal Bureau of Investigation. O'Connor alleged that Luis Riveiro, an employee of GMOG, calculated that GMOG earned revenue of approximately $3,186,910 from 1989 to 1992. O'Connor stated that ten to fifteen percent of these revenue figures were earned from legitimate business, namely non-gambling machine business and that an

additional five (5) percent was earned outside of West New York. O'Connor calculated the ultimate figure used to sentence Pena, $2,573,429, by multiplying the $3,186,910 by eighty percent, subtracting the twenty percent of revenue earned either outside of West New York or through other sources.

At the time of Pena's sentence, Judge Simandle ran his base offense level calculation according to U.S.S.G. Section 2C1.1 at an offense level of 10. From this base level of 10, the Court increased the offense level based upon Pena's receipt of more than two bribes, two levels pursuant to U.S.S.G. Section 2C1.1(b). This increased Pena's base offense level to 12. Judge Simandle then increased Pena's base offense level from 12 to 25 based upon U.S.S.G. Section 2C1.1 concluding that the benefit conferred for the purposes of the base offense level calculation was the $2,573,429 gross revenue figure.

Petitioner took issue with the position that revenues as opposed to net profit by GMOG was used to calculate the benefit received by the payer of the bribe (GMOG) and argued instead that the expenses of the operation of GMOG as a business both illegitimate and legitimate must be subtracted from the gross revenue in calculating net benefit.

As noted above, the district court did not agree nor did the Third Circuit Court of Appeals.

REASON FOR GRANTING THE WRIT

The Petition should be granted because the Third Circuit Court of Appeals has entered a decision in this case which is in direct conflict with a decision of another United States Court of Appeals on the same important matter.

In doing so, the Third Circuit acknowledged that its decision was based primarily upon the consideration of two cases — *Schweitzer*, 5 F.3d 44 (3d Cir. 1993) and *United States v. Sapoznik*, 161 F.3d 1117 (7th Cir. 1998). That Court further acknowledged that if it "were to follow *Sapoznik*, Pena might in fact succeed, while, under *Schweitzer*, he clearly will not." *Pena* at 10. This Court should grant the petition for a Writ of Certiorari for this self-recognized incongruence with the decision of another circuit on this very important issue with far reaching ramifications. Indeed, one of the compelling reasons listed in the Rules of the Supreme Court of the United States, specifically, Rule 10, for granting such Writ, is when a United States Court of Appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same important matter. Because of this now existing conflict, two defendants convicted of the exact same crime, could receive drastically different sentences based only on the geographical location of the commission of their respective crimes.

I. A PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED, BECAUSE THIS ISSUE INVOLVES A QUESTION OF EXCEPTIONAL PUBLIC IMPORTANCE, AND THE THIRD CIRCUIT COURT OF APPEALS DECISION IS IN DIRECT CONFLICT WITH A DECISION OF THE SEVENTH CIRCUIT COURT OF APPEALS.

On October 10, 2001, the Third Circuit Court of Appeals rendered a decision in the matter of *United States v. Arthur Pena*, 268 F.3d 215 (2001). The issue on appeal in *Pena* as succinctly summarized in the text of that decision, was

> the proper application of Section 2C:1.1 of the United States Sentencing Guidelines to the facts of the case and, specifically, the propriety of the District Court's 13 level increase in Pena's offense level based on the benefit received by the payor of the bribes from Pena's illegal conduct between 1989 and 1992.

Id. at 1.

It was the position of the petitioner that "because the Government failed to prove the 'net benefit' to the gambling machine distributors who paid the bribes at issue, he should have been sentenced based on the aggregate of the bribes." *Id.* at 1-2. As part of that argument, Pena urged "that the net benefit calculation required showing a net profit to the distributor." The Court rejected petitioner's argument based upon its prior decision in *United States v. Schweitzer*, 5 F.3d 44 (3d Cir. 1993), and it upheld Pena's sentence as set down by the District Court. During Pena's sentence, the Government made no effort to net out the costs associated with the gambling that the bribes generated.

In 1998, the Seventh Circuit rendered a decision in a case whose facts are amazingly similar to those of the case at bar. In *Sapoznik*, the defendant plead guilty to conducting an enterprise through racketeering in violation of the provisions of the RICO statute. In that case, the defendant was the police chief of North Lake, a suburb of Chicago and during his tenure and his job which lasted from 1990 to 1994, he received some $500.00 per month from the "Outfit", the Chicago branch of the mafia, to protect illegal gambling in the towns bars and restaurants. The defendant was sentenced to 88 months in prison. The Court of Appeals for the Seventh Circuit vacated the defendant's sentence and remanded the matter for resentencing pursuant to the opinion.

In *Sapoznik,* the Court based the severity of the punishment for defendant's crimes upon the "benefit received" in return for the bribes relying on U.S.S.G § 2C1.1(b)(2)(A) and application note 2. The beneficiaries of the bribes were the owners of the bars and the restaurants that provided the illegal gambling the defendant protected plus "the outfit" which took a percentage of the gambling revenues." The District Court estimated those revenues at six (6) million which, if they were, as the Court believed, the "benefit received" within the guidelines meaning, put the defendant in the five (5) million plus bracket, requiring a base offense level increase of 14. The defendant challenged the six (6) million calculation on the grounds that the Government failed to show how much of it was actually due to his bribe-induced efforts to protect the illegal gambling. Additionally, the defendant raised a question of causation. The Court concluded that "it is profoundly unclear how much they (the bribes) contributed to the profits of the illegal gambling". 161 F.3d at 1119. In that case, the Government conceded that the relevant "benefit" received is indeed profit (net revenue) and not gross revenue.

The Court noted in *Sapoznik* that the Government made no effort to net out the costs associated with the gambling which the bribes facilitated. The Court concluded in that case that "we have no idea what the costs associated with the gambling activity of North Lakes' bars and restaurants are and there is nothing in the record to fill the void in our knowledge". 161 F.3d at 1119. Additionally, the Court noted that "we don't even know whether these establishments paid excise taxes on their gambling revenues. Excise taxes are deducted from gross revenues to determine net revenues or profit". 116 F.3d at 1119. Based upon the Court's analysis, Sapoznik's sentence was vacated due to the error in the computation of the net benefit generated by the bribes.

In Pena's case, the Government was able to make no distinction whatsoever between net revenue and gross revenue and simply put forth a figure, after accounting only for legitimate "expenses", of approximately $2,500,000, as the "revenue" generated by GMOG. Petitioner asserts that the sentencing guidelines clearly state at U.S.S.G. § 2C1.1 comment, 2, that the value of the "benefit received or to be received" means the net value of such benefit. As such, Petitioner asserts that the expenses of the operations of GMOG as a business both illegitimate and legitimate must be subtracted from the gross revenue figures provided by the Government in calculating that benefit. It appears that if he had committed the offense within the geographical jurisdiction of the Seventh Circuit Court of Appeals he would be correct, but because he lives within the geographical jurisdiction of the Third Circuit he is not. This dichotomy with grave and far reaching ramifications, requires a plenary review by this Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

ANTHONY J. IACULLO
Counsel of Record
PAUL M. DASILVA
IACULLO & MARTINO, LLC
Attorneys for Petitioner
103 Park Street
Third Floor
Montclair, NJ 07042
(973) 746-5858

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AND FILED OCTOBER 10, 2001

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NO. 00-5169

UNITED STATES OF AMERICA

v.

ARTHUR PENA,

Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Criminal No. 98-cr-00022-4)
District Judge: Honorable Jerome B. Simandle

Argued July 20, 2001

Before: SCIRICA, RENDELL, and ROSENN, *Circuit Judges*,

(Filed October 10, 2001)

* * *

Appendix A

OPINION OF THE COURT

RENDELL, *Circuit Judge*.

Arthur Pena was a veteran police officer of the West New York, New Jersey, Police Department ("WNYPD"), who, along with other officers, accepted bribes in return for permitting illegal poker video gambling machines to operate without interference in certain areas of New Jersey. At issue on appeal is the proper application of §2C1.1 of the United States Sentencing Guidelines to the facts of this case, and, specifically, the propriety of the District Court's 13-level increase in Pena's offense level based on the benefit received by the payor of the bribes from Pena's illegal conduct between 1989 and 1992. He contends that, because the government failed to prove the "net benefit" to the gambling machine distributors who paid the bribes at issue, he should have been sentenced based on the aggregate amount of the bribes. As a part of this argument, he urges that the "net benefit" calculation requires a showing of the net profit to the distributor. The District Court correctly rejected his arguments based on our prior decision in *United States v. Schweitzer*, 5 F.3d 44 (3d Cir. 1993). We will affirm.

Pena was convicted by a jury in the United States District Court for the District of New Jersey of conspiracy to commit extortion in violation of 18 U.S.C. §1951(a) for "protection" payments made between 1989 and 1996 by one of the distributors of the machines at issue, GMOG.[1] GMOG was

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1. The jury also found Pena guilty on two counts of an indictment charging him with subscribing false 1991 and 1992 tax returns in violation of 26 U.S.C. § 7206(1).

owned by George Riveiro, who operated it with the help of his brother Luis. GMOG placed the machines in establishments such as bars and restaurants, maintained the machines, and split the profits with the establishments' owners. Patrons would deposit money into the machines for game credits on which they made wagers; at the end of the game, the credits would be exchanged for cash. GMOG collected the money from the machines weekly, figured out the credits, reimbursed the establishment for the money paid out to winners, and then split the profit with the establishment on a 50:50 basis.

The evidence at trial revealed routine payments had been made by GMOG to Pena in the amount of $2,000 each month from 1989 through April 1993. At sentencing, the government introduced the affidavit of FBI Special Agent Kenneth O'Connor recounting interviews he had with Luis Riveiro on December 3 and 7, 1999, regarding the monies derived from the operations. The affidavit contained the following evidentiary averments:

> 4. During the above-described conversation, [Luis] Riveiro told me, in substance and in part, that approximately two years ago he totaled the weekly figures and determined how much GMOG collected on a yearly basis from 1988 through 1995. Riveiro stated that in 1988 they earned $323,000, in 1989 the amount was $986,300, in 1990 the amount was $1,021,700, in 1991 they earned $726,800, in 1992 they earned $452,110, in 1993 they earned $302,630, in 1994 they earned about $158,290, and in 1994 they earned about

> $41,380. He further told me that about ten to fifteen percent of these figures were derived from legal activity such as children's games and juke boxes and that about ninety-five percent of these earnings were from machines in West New York, New Jersey.
>
> 5. In December 1999 I spoke to George Riveiro, the owner of GMOG. He told me in substance and in part, that GMOG earned an average of $5,000-$6,000 in profit per week during the most profitable years. George Riveiro also told me that his brother Luis Riveiro actually collected the revenues from the locations where they placed machines and thus, would be in a better position to provide a more accurate recollection of GMOG's revenues.

App. at 107.

Pena argued at sentencing that the government had failed to prove the specific "net profit" or "net benefit" and that the court must sentence him based on the aggregate bribe amount proven — $96,000. The government argued that it had in fact proven the benefit received by GMOG, namely, the revenues GMOG realized from the illegal operation.

The District Court considered the parties' arguments and adjourned the hearing in order to consider the issue in the context of a recent split in the rulings of the courts of appeals as to the meaning of "net benefit" under the sentencing guidelines.

Appendix A

The District Court reconvened the sentencing hearing two months later and ruled that, consistent with our opinion in *United States v. Schweitzer*, "net benefit" in this situation was the monies realized from the illegal operation, quoting our statement in *Schweitzer* that "net benefit . . . has nothing to do with expense incurred by the wrongdoer in obtaining the net value received" where the transaction was wholly illegal. 5 F.3d at 47.

The District Court then relied on the revenues shown to have been received by GMOG for the 50:50 split from illegal operations. Then, based on the information Luis Riveira provided O'Connor, the Court netted out 20% to account for business outside of West New York and the proceeds from the few legitimate machines, and therefore made a fact finding of $2,573,000 as "GMOG's net benefit received for the years 1989 through 1997." App. at 81-82.

The District Court noted that the government had offered two different calculation methods, but both arrived at approximately the same number.[2] Based on this finding,

---

2. The District Court explained:

> The amounts of winnings are about as precise as we can determine them in hindsight. This figure is also supported by a completely different method, namely, if we had taken the probation department's estimates of 16,000 a month in '89 and 70,000 a month in '90, '91 and '92, we get a figure of approximately 2.7 million dollars, those are figures that come from paragraph 146. So the two sums are quite consistent by either method of calculation.

App. at 82.

Pena's offense level was 25, and with a Criminal History level of 1, the guideline range was 57 to 71 months. The District Court sentenced Pena to 57 months.

The District Court had jurisdiction pursuant to 18 U.S.C. §3231. We exercise jurisdiction over this appeal of the Court's sentencing determination based on 28 U.S.C. §1291 and 18 U.S.C. §3742(a)(2).

We begin our review by examining the guideline provisions at issue found at §2C1.1, which states that the base offense level of 10 is to be increased in certain circumstances:

> *Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right*
>
> . . . .
>
> (A) If the *value of the payment*, the *benefit received or to be received in return for the payment*, or *the loss* to the government from the offense, *whichever is greatest*, exceeded $2,000, increase by the corresponding number of levels from the table in §2F1.1 (Fraud and Deceit).

U.S. Sentencing Guidelines Manual §2C1.1(b)(2)(A) (2000) (emphasis added).

It is conceded that, here, the value of the "benefit received in return for the payment" was greater than the value of the

payment, or the loss to the government. Accordingly, we look to Application Note 2, which explains:

> . . . The value of "the benefit received or to be received" means the net value of such benefit. *Examples*: (1) A government employee, in return for a $500 bribe, reduces the price of a piece of surplus property offered for sale by the government from $10,000 to $2,000; the value of the benefit received is $8,000. (2) A $150,000 contract on which $20,000 profit was made was awarded in return for a bribe; the value of the benefit received is $20,000. Do not deduct the value of the bribe itself in computing the value of the benefit received or to be received. In the above examples, therefore, the value of the benefit received would be the same regardless of the value of the bribe.

U.S. Sentencing Guidelines §2C1.1, cmt. n.2 (2000).

The "Background" section of the Application Notes states, further:

> Where the value of the bribe exceeds the value of the benefit or the value of the benefit cannot be determined, the value of the bribe is used because it is likely that the payer of such a bribe expected something in return that would be worth more than the value of the bribe. Moreover, for deterrence purposes, the punishment should be commensurate with the gain to the payer or the recipient of the bribe, whichever is higher.

Appendix A

U.S. Sentencing Guidelines §2C1.1, cmt. background (2000).

While Pena criticizes the vague nature of the numbers contained in the O'Connor affidavit as a basis for calculating the dollar amounts for purposes of sentencing, he does not challenge its sufficiency or the court's factual finding as such.[3] Rather, he attacks the District Court's ruling that the revenues, rather than the net profits, are the proper measure of "net value" of the benefit. He complains that the District Court has misinterpreted the guidelines. Accordingly, we will review the District Court's ruling under a de novo standard. *United States v. Geevers*, 226 F.3d 186, 189 (3d Cir. 2000).

Pena relies to a great extent on the decision of the Seventh Circuit Court of Appeals in *United States v. Sapoznik*, 161 F.3d 1117 (7th Cir. 1998), decided after our ruling in *Schweitzer*. Pena limits his discussion to the consideration of these two cases. We note that if we were to follow *Sapoznik*, Pena might in fact succeed, while, under *Schweitzer*, he clearly will not.

Sapoznik also involved illegal gambling operations, and the court there held that the government had failed to prove *net profit*. Interestingly, Chief Judge Posner, in his opinion, notes:

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3. Pena attacks the substance of O'Connor's affidavit based only on his view that specific *net* revenue needed to be shown and that, lacking such proof, the bribe amount should be used. Appellant's Brief at 18-20.

> The government concedes that the relevant "benefit received" is indeed profit (net revenue) and not (gross) revenue. U.S.S.G. §2C1.1, Application Note 2; *United States v. Glick*, 142 F.3d 520, 525-26 (2d Cir. 1998); *United States v. Schweitzer*, 5 F.3d 44, 47 (3d Cir. 1993); *but cf. United States v. McAlpine*, 32 F.3d 484, 489 (10th Cir. 1994).

161 F.3d at 1119. Given this concession, the court examined the record and held that the case should be remanded for resentencing, because the record contained no proof by the government regarding the costs of the illegal enterprise. While we understand that the government's concession may have misdirected that court, we reject the notion that profit is relevant for a consideration of "net value" of "benefit." We also reject the thought that our decision in *Schweitzer*, or the Second Circuit's decision in *Glick*, stood for such a conclusion, as the Seventh Circuit's reference seems to indicate. Although in certain cases the profit may be equal to the net value, as illustrated by Application Note 2, and as we discuss in more detail below, the concept of netting out costs to arrive at profit is inappropriate under the Guidelines section when the transactions are entirely illegitimate.

Pena argues that *Sapoznik* requires us to consider only GMOG's net profit by subtracting out costs related to the illegal activity, and he tries to find in *Schweitzer* some further support. In *Schweitzer* we first considered the meaning of "net value" of benefit. Schweitzer was a private investigator who bribed former and current employees of the Office of Inspector General for confidential information that he then

supplied to others for a fee. After paying $4,680 for the information, he sold it for roughly two times that amount. We rejected Schweitzer's contention that the $4,680 should be deducted — his cost for conducting the illegal activity — noting that the cases he relied upon allow for the deduction of the value that would be derived in a legitimate transaction not induced by a bribe, whereas he was arguing not that value derived, but rather expenses incurred, should be deducted. We noted that the concept of value had nothing to do with costs incurred. In *Schweitzer* we did not specifically address the issue of net profit or the deduction of costs of operation, because the "amount paid" appears to have been the bribe amount specifically not deductible under the guidelines.

Nonetheless, we think that our focus in *Schweitzer* was entirely correct. Application Note 2 actually provides the proper focus, **U.S. Sentencing Guidelines,** §2C1.1, cmt. n.1 (2000). It speaks in terms of "net value" of benefit. *Id.* The examples it recites clearly demonstrate that, to arrive at the proper amount, we are to deduct the value legitimately and *actually given*, from the *value received*, to arrive at the "net value" of the benefit caused by the bribe. *Id.* Thus, if a $10,000 piece of property is sold for $2,000, the bribe caused an $8,000 benefit — the purchaser received a $10,000 piece of property for only $2,000. Similarly, if a $20,000 profit is made on a $150,000 contract, the contract provided $130,000 of services and/or product — value given — so the benefit caused by the bribe was $20,000. In both examples, there was, as we noted in *Schweitzer*, "a sale item" that "had a value that a purchaser in a legitimate transaction would receive," and "*that* value was *not* received *as a result of the bribe* and should not be considered in determining the degree

of the bribe giver's culpability." We stated, in clear terms: "This concept of 'net value received' has nothing to do with the expense incurred by the wrongdoer in obtaining the net value received. This is clear from the Note's instruction that the value of the bribe is not to be deducted in calculating the 'net value.' " 5 F.3d at 47.

We were entirely correct in *Schweitzer*, and when we apply this reasoning to the case at hand it is apparent that the illegal gambling operations involved no legitimate object or service of value, and that *every dollar* received by GMOG was received because of the bribe — not because of the intrinsic value of anything being provided. As a result, the entire amount of the revenue was the benefit. Unlike a situation where something of legitimate value was provided to an individual, or for the benefit of society, such as services or a physical item of value, the operations here were wholly illegal and therefore there was no *other* value to "net out."

Pena attempts to address this aspect of *Schweitzer* by arguing that the government should have netted out monies that the machines generated that may have been legitimate. But the District Court already took into account Riveiro's estimate of legitimate proceeds from legitimate machines or other locations, and Pena's counsel admitted that all revenues from the gambling machines were illegal. To require that other monies be deducted would convert the test into one in which the government must investigate whether any legitimate value had been given in an illegal operation. While the government does have the burden to establish the value, *United States v. McDowell*, 888 F.2d 285, 291(3d Cir. 1989), we are not prepared to impose on the government the onerous

task of proving that each separate expense transaction in an illegal operation had absolutely no legitimate value or benefit. Pena asks us to read too much into the concepts of "value" and "benefit." We believe it more appropriate to limit the exercise to an assessment of what is obvious in the fact pattern. In both of the examples in the guidelines it is quite apparent that something legitimate was in fact provided in the transaction, and the bribe-caused portion easily identifiable. Here, it is just as easily seen that nearly all the revenues were derived from the illegal operation of the machines and were directly attributable to, and derived on account of, the bribes in question.

We also note that the notion of deducting costs associated with furthering purely illegal activity, as the reasoning of *Sapoznik* would call for, is simply illogical. First, it would be nearly impossible to establish because most criminals do not keep detailed records regarding the costs of maintaining their illegal business. Second, these expenses were tainted because they were incurred in furthering the criminal activity.

Thus, we have held, and we reiterate, that "net value" of the "benefit" received does not mean "net proceeds." Rather, it means benefit received after netting out the value of what — if anything — of legitimate value, was provided.

It is interesting to note that the case law reference to net profit, or netting out costs, may have arisen due to the fact that, in some instances, the two concepts — deducting value given and deducting direct costs — may be somewhat the same. For instance, consider the case of the doctor who bribes an official and, as a result, obtains many referrals for the

sale of lymphodema pumps, as in *United States v. Leon*, 2 F. Supp. 2d 592 (D.N.J.1998). If the doctor has sold the pumps for $100, but they were worth $60 — which he did pay, and which value the purchaser did receive — there are two ways of looking at the fact that the net *benefit* was $40. Perhaps a court might describe the underlying principle in terms of permitting the deduction of direct costs, i.e., a cost of goods sold. Based on our reading of the guidelines, however, we view this in terms of "netting out" the legitimate value given, i.e., the portion that was received not as a result of the bribe, but rather in return for the product's intrinsic value. There is simply no such value in this case.

We note that, as we mentioned above, the District Court here took extra time to examine this issue and "got it right." The court drew on *Schweitzer* and its obvious implications in this case, correctly reasoning:

> As applied to the present case, *Schweitzer* teaches that where the object of the conspiracy, namely, the protection of illegal gambling, is illegitimate, all proceeds flowing to the conspirators — here, GMOG — are to be regarded as the benefit received in return for the extortion payment. The "net value" of the benefit received by Pena's coconspirators at GMOG is the gross revenues they derived from the protected illegal gambling in West New York in the relevant time period.

App. at 72.

The District Court then noted that the proper analysis had been similarly conducted in *United States v. Leon*, summarizing the court's explanation in that case:

> The Court's task is to determine the difference between what did happen as a result of the bribe and what would have happened if not [for] the bribe. The Court would permit the deduction of legitimate costs that would have been incurred in a legitimate transaction regardless of a bribe payment, and the Court would not deduct illegitimate costs that would not have occurred in the absence of a bribe payment.

App. at 72 (paraphrasing *Leon*, 2 F. Supp. 2d at 597).

The District Court concluded:

> I hold that in calculating the "benefit received" from payment of extortion to protect illegal gambling, the proper figure equals the revenues received by the bribe payors (here, the GMOG owners) derived from the illegal gambling operations which were being protected, unreduced by the amount of the bribes themselves or by the other costs of maintaining the illegal gambling business.

App. at 75.

Accordingly, the District Court committed no error in its reasoning and ruling, and we will affirm its judgment of conviction and sentence.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED AND FILED FEBRUARY 23, 2000

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Case Number: 1:98-CR-22-04

UNITED STATES OF AMERICA

v.

ARTHUR PENA

Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, ARTHUR PENA, was represented by Anthony Iacullo, Esq., Iacullo & Salutti, 103 Park Avenue, 3rd Floor, Montclair, NJ 07042.

On motion of the United States the court has dismissed the original indictment. The defendant has been found not guilty on count(s) 1, 2, 4, 14, 15, 17 of superseding indictment and is discharged as to such count(s).

The defendant was found guilty on count 16 of the superseding indictment by a jury verdict on 5/21/99 and counts 1 and 2 of the superseding information by a jury verdict on 6/30/99 after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such count(s), involving the following offense(s):

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Title & Section	**Nature of Offense**	**Date of Offense**	**Count Number(s)**
18 USC 1951(a)	Extortion Under the Color of Official Right	1996	16 - of the superseding indictment
26 USC 7206	Subscribing False Income Tax Returns	4/6/92	1 - of the superseding information
26 USC 7206	Subscribing False Income Tax Returns	4/5/93	2 - of the superseding information

As pronounced on 2/18/00, the defendant is sentenced as provided in pages 2 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a total special assessment of $200.00, for count 16 of the superseding indictment and counts 1 and 2 of the superseding information, which shall be due immediately. Said special assessment shall be made payable to the Clerk, U.S. District Court.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 23 day of February, 2000.

Defendant's SSN: 150-50-6214
Defendant's Date of Birth: 12/4/53
Defendant's address: 8714 Tonnelle Ave.,
North Bergen, NJ 07047

s/ Jerome B. Simandle
Jerome B. Simandle
United States District Judge

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 57 Months on Count 16 of the Superseding Indictment and 36 months on each of Counts 1 and 2 of the Superseding Information, all such terms to run concurrently.

The Court makes the following recommendations to the Bureau of Prisons: a place of confinement in New Jersey.

The defendant shall surrender for service of sentence on Monday, March 27, 2000 by 12:00 Noon at the institution designated by the Bureau of Prisons as notified by the U.S. Probation Office.

* * *

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SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of 3 years on Count 16 of the Superseding Indictment and 1 year on each of Counts 1 and 2 of the Superseding Information, all such terms to run concurrently.

While on supervised release, the defendant shall comply with the standard conditions that have been adopted by this court (set forth below):

> The defendant shall submit to one drug test within 15 days of commencement of supervised release and at least two tests thereafter as determined by the probation officer.
>
> If ordered to the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.
>
> If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remains unpaid at the commencement of the term of supervised release.

and shall comply with the following additional conditions:

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The defendant shall provide the U.S. Probation Office with full disclosure of his financial records to include yearly income tax returns upon the request of the U.S. Probation Office. The defendant shall cooperate with the probation officer in the investigation of his financial dealings and shall provide truthful monthly statements of his income.

The defendant is to fully cooperate with the Internal Revenue Service by filing all delinquent or amended returns within 18 months of the sentence date and to timely file all future returns that come due during the period of supervised release. The defendant is to properly report all correct taxable income and claim only allowable expenses on those returns. The defendant is to provide all appropriate documentation in support of said returns. Upon request, the defendant is to furnish the Internal Revenue Service with information pertaining to all assets and liabilities, and the defendant is to fully cooperate by paying all taxes, interest and penalties due, and otherwise comply with the tax laws of the United States.

* * *

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STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not commit another federal, state, or local crime during the term of supervision.

2) The defendant shall not illegally possess a controlled substance.

3) If convicted of a felony offense, the defendant shall not possess a firearm or destructive device.

4) The defendant shall not leave the judicial district without the permission of the court or probation officer.

5) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.

6) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

7) The defendant shall support his or her dependants and meet other family responsibilities.

8) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

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9) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.

10) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.

11) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

12) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

13) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

14) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

15) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

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16) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

FINE

The defendant shall pay a fine of $1000. on Count 16 of the Superseding Indictment.The Court will waive the imposition of a fine for Counts 1 and 2 of the Superseding Information.

The fine, plus any interest pursuant to 18 USC § 3612(f)(1), shall be paid immediately. It is recommended that the defendant participate in the Bureau of Prisons Inmate Financial Responsibility Program. Any outstanding balance can be paid in monthly installments of not less than $50 over the term of supervised release until the full amount has been paid.

The Court determines that the defendant does not have the ability to pay interest and therefore waives the interest requirement pursuant to 18 U.S.C. 3612(f)(3).

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. 3614.

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STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report.

Guideline Range Determined by the Court:

Total Offense Level:	25
Criminal History Category:	1
Imprisonment Range:	57 months to 71 months.
Supervised Release Range:	2 to 3 years
Fine Range:	$ 10,000 to $ 100,000
Restitution:	$ n/a

The fine is below the guideline range because of the defendant's inability to pay.

The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED NOVEMBER 28, 2001

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NO. 00-5169

UNITED STATES OF AMERICA

v.

ARTHUR PENA,

Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Criminal No. 98-cr-00022-4)
District Judge: Honorable Jerome B. Simandle

Present: BECKER, SLOVITER, MANSMANN, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, and ROSENN*, *Circuit Judges*,

SUR PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING IN BANC

The petition for rehearing filed by appellant having been submitted to all judges who participated in the decision of

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* Hon. Max Rosenn, Senior Judge of the United States Court of Appeals for the Third Circuit; vote limited to panel hearing only.

this court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is hereby DENIED.

BY THE COURT:
s/ [illegible]
Circuit Judge

Dated: NOV 28, 2001

APPENDIX D — UNITED STATES SENTENCING GUIDELINES

§ 2C1.1. Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right

(a) Base Offense Level: 10

(b) Specific Offense Characteristics

(1) If the offense involved more than one bribe or extortion, increase by 2 levels.

(2) (If more than one applies, use the greater):

(A) If the value of the payment, the benefit received or to be received in return for the payment, or the loss to the government from the offense, whichever is greatest (i) exceeded $2,000 but did not exceed $5,000, increase by 1 level; or (ii) exceeded $5,000, increase by the number of levels from the table in § 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

(B) If the offense involved a payment for the purpose of influencing an elected official or any official holding a high-level decision-making or sensitive position, increase by 8 levels.

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(c) Cross References

(1) If the offense was committed for the purpose of facilitating the commission of another criminal offense, apply the offense guideline applicable to a conspiracy to commit that other offense if the resulting offense level is greater than that determined above.

(2) If the offense was committed for the purpose of concealing, or obstructing justice in respect to, another criminal offense, apply § 2X3.1 (Accessory After the Fact) or § 2J1.2 (Obstruction of Justice), as appropriate, in respect to that other offense if the resulting offense level is greater than that determined above.

(3) If the offense involved a threat of physical injury or property destruction, apply § 2B3.2 (Extortion by Force or Threat of Injury or Serious Damage) if the resulting offense level is greater than that determined above.

(d) Special Instruction for Fines - Organizations

(1) In lieu of the pecuniary loss under subsection (a)(3) of § 8C2.4 (Base Fine), use the greatest of: (A) the value of the unlawful payment; (B) the value of the benefit received or to be received in return for the unlawful payment; or (C) the consequential damages resulting from the unlawful payment.

APPENDIX E — APPLICATION NOTE

Commentary

***Statutory Provisions**: 18 U.S.C. §§ 201(b)(1), (2), 872, 1951. For additional statutory provision(s), **see** Appendix A (Statutory Index).*

Application Notes:

1. *"Official holding a high-level decision-making or sensitive position" includes, for example, prosecuting attorneys, judges, agency administrators, supervisory law enforcement officers, and other governmental officials with similar levels of responsibility.*

2. *"Loss", for purposes of subsection (b)(2)(A), shall be determined in accordance with Application Note 2 of the Commentary to §2B1.1 (Theft, Property Destruction, and Fraud). The value of "the benefit received" means the net value of such benefit. **Examples:** (1) A government employee, in return for a $500 bribe, reduces the price of a piece of surplus property offered for sale by the government from $10,000 to $2,000; the value of the benefit received is $8,000. (2) A $150,000 contract on which $20,000 profit was made was awarded in return for a bribe; the value of the benefit received is $20,000. Do not deduct the value of the bribe itself in computing the value of the benefit received or to be received. In the above examples, therefore, the value of the benefit received would be the same regardless of the value of the bribe.*

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3. *Do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill) except where the offense level is determined under §2C1.1(c)(1), (2), or (3). In such cases, an adjustment from §3B1.3 (Abuse of Position of Trust or Use of Special Skill) may apply.*

4. *In some cases the monetary value of the unlawful payment may not be known or may not adequately reflect the seriousness of the offense. For example, a small payment may be made in exchange for the falsification of inspection records for a shipment of defective parachutes or the destruction of evidence in a major narcotics case. In part, this issue is addressed by the adjustments in §2C1.1(b)(2), and §2C1.1(c)(1), (2), and (3). However, in cases in which the seriousness of the offense is still not adequately reflected, an upward departure is warranted.* ***See*** *Chapter Five, Part K (Departures).*